Circus Circus Casinos, Inc. d/b/a Circus Circus Las Vegas *and* Michael Schramm. Case 28–CA–120975

April 15, 2021

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS EMANUEL AND RING

On June 15, 2018, the National Labor Relations Board issued a Decision and Order[1] finding that the Respondent, Circus Circus Casinos, Inc. d/b/a Circus Circus Las Vegas, violated Section 8(a)(1) of the Act by (1) threatening to discharge the Charging Party, Michael Schramm, due to his protected concerted complaints about employees' exposure to second-hand marijuana smoke, (2) refusing Schramm's request for a union representative at his December 13, 2013[2] "due process" meeting pursuant to *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975),[3] and (3) suspending and discharging Schramm because of his protected complaints. The Respondent filed a petition for review of the Board's Order with the United States Court of Appeals for the District of Columbia Circuit, and the Board filed a cross-application for enforcement. On June 12, 2020, the court granted the petition for review in full, vacated the Board's Order, and remanded. The court found that Schramm was not threatened and did not request a union representative at the due process meeting and thus was not denied his *Weingarten* rights, and it returned the case to the Board solely to reconsider whether the Respondent unlawfully suspended and discharged Schramm.[4]

On September 16, 2020, the Board notified the parties to this proceeding that it had accepted the court's remand and invited them to file statements of position. The Respondent filed a statement of position.

We have carefully reviewed the record and the Respondent's statement of position in light of the court's decision, which we accept as the law of the case. For the reasons explained below, we dismiss the complaint.

Background

The Respondent employed Schramm for carpentry projects during the fall of 2013 at its casino and hotel in Las Vegas, Nevada. Schramm was represented by the Southwest Regional Council of Carpenters and its affiliated Local Union No. 1780 (Union). At safety meetings in November 2013, Schramm and engineer Fred Tenney voiced their common concerns about employees' exposure to second-hand marijuana smoke in the hotel. The judge credited testimony that Engineering Department Manager Rafe Cordell responded to these statements by angrily telling Schramm, "Well maybe we just won't have a need for you," and she found that by making this threat, the Respondent violated Section 8(a)(1) of the Act.

The Respondent is subject to the OSHA asbestos standard, 29 C.F.R. 1910.1001, because older parts of its building have "presumed asbestos containing material." Like other carpenters and engineering department employees, Schramm was classified as an employee who might need to wear a respirator to avoid exposure to asbestos. The OSHA standard requires medical examinations for such employees. On December 10, a supervisor instructed Schramm to report for a medical exam between 2 p.m. and 2:30 p.m. A foreman later told Schramm that he could be examined right after his lunch break ended at 1:30 p.m.

Schramm arrived at the exam area around 1:35 p.m. Medical personnel employed by an outside contractor asked Schramm to fill out standard forms and provide routine data (e.g., height and weight). He refused and asked if he could first speak to the doctor about a personal issue. Schramm was anxious to be declared medically exempt from respirator use because he was afraid to wear one, but he did not say so. The medical personnel replied that Schramm must first complete the required preliminaries. Schramm responded that he would return at his original appointed time between 2:00 and 2:30 and that "he would straighten this out [with his foreman] because I got to see her [the doctor]." The medical personnel advised the Respondent's safety manager and an engineering manager of Schramm's refusal, and they, in turn, informed Cordell.

Cordell had Schramm report to his office immediately. He told Schramm that he was suspended pending investigation for refusing to undergo the OSHA-required exam. Schramm replied that he was willing to undergo the exam and that he was still within his original appointed exam time. Cordell responded that it was too late. Schramm's supervisor escorted Schramm out of Cordell's office.

Cordell asked Airth Colin, a human resources representative, to investigate. Colin did so and determined that Schramm had refused to undergo the medical exam. Colin

[1] *Circus Circus Casinos, Inc.*, 366 NLRB No. 110 (2018).

[2] All dates are in 2013 unless otherwise stated.

[3] In *Weingarten*, the Supreme Court held that an employee has a Sec. 7 right, upon request, "to the presence of a union representative at an investigatory interview in which the risk of discipline reasonably inheres . . . ." Id. at 262. There is no dispute that the December 13, 2013 "due process" interview was such a meeting. Then-Chairman Ring dissented from the majority's violation finding on the basis that Schramm did not request a *Weingarten* representative.

[4] *Circus Circus Casinos, Inc v. NLRB*, 961 F.3d 469 (D.C. Cir. 2020).

called Schramm on December 12 to tell him to report for a due process meeting the following day.

At the meeting the next day, the participants were Schramm, Cordell, Colin, and Sondra Mower, another human resources representative. Schramm explained that he wanted to speak to the doctor because he was afraid to wear a respirator mask but did not want his coworkers to know. He also said that he would complete the exam if he could return to work.

Following the meeting, Colin reviewed the results of her investigation with Cordell and two managers from human resources. They decided to discharge Schramm for refusing to undergo the required exam. Cordell advised Union Business Agent Richard Williams of the decision. Williams did not protest, but he asked that the discharge be changed to a layoff for lack of work so that Schramm would be eligible for rehire by the Respondent. Cordell agreed. On December 20, Cordell, Colin, and Mower met with Schramm and gave him a separation notice marked "Project Ended."

The Board adopted the judge's decision finding that the Respondent had violated Section 8(a)(1) by threatening Schramm and suspending and discharging him.[5] Regarding the discharge, the judge found that the General Counsel had met his initial burden under *Wright Line*[6] by establishing that Schramm's second-hand marijuana smoke protests were protected concerted activity and that the Respondent was aware of and harbored animus against that protected activity. In finding animus, the judge relied exclusively on Cordell's alleged threat to Schramm. The judge rejected as pretextual the Respondent's *Wright Line* defense that it would have discharged Schramm for refusing the medical exam regardless of his protected activity. The judge reasoned that if the Respondent's professed concerns were sincere, it would have allowed Schramm to speak to the doctor first—as was his right, the judge found—or at least given him a second chance to undergo the examination, as he twice offered to do.

The District of Columbia Circuit rejected the judge's credibility-based finding that Cordell threatened Schramm and vacated the Board's 8(a)(1) threat finding. *Circus Circus Casinos*, 961 F.3d at 484–487. Turning to the discharge, the court assumed without deciding that the General Counsel had met his burden of proving that Schramm's protected complaints were a motivating factor in the Respondent's decision and then rejected the Board's finding that the Respondent had failed to sustain its *Wright Line* defense burden. Id. at 480–482. The court found that the Board erred in failing to analyze the latter issue under the standard set forth in *Sutter East Bay Hospitals v. NLRB*, 687 F.3d 424 (D.C. Cir. 2012). Under that test, it must be determined, first, whether the Respondent reasonably believed that Schramm had refused to take the medical exam, and second, whether his discharge was consistent with the Respondent's normal policies and practice regarding such misconduct. *Circus Circus Casinos*, 961 F.3d at 481–482. The court held that *Sutter East Bay* was applicable notwithstanding the judge's pretext finding. Id. at 482–483. Moreover, the court disagreed with that finding, rejecting

> the alternative reasoning supplied by the Board that Circus "should have" been satisfied by Schramm's offers to retake the medical exam if his refusal was the company's "true concern." Circus is entitled to a policy of strict enforcement of its rules related to insubordination and compliance with testing policies. The Board cannot second guess an employer's legitimate and consistently enforced policies for safety and discipline in the workplace. To do so exceeds the Board's expertise and authority under the Act.

Id. at 482. The court also rejected the Board's reliance on the judge's opinion that Schramm had a right to speak to the doctor before completing other preliminaries, finding it irrelevant. The court remanded the case to the Board for further proceedings consistent with its opinion. "On remand," the court stated, "the Board may reconsider whether the record supports an unlawful termination finding under the correct standard." Id. at 483.

Discussion

As noted, the court assumed without deciding that the General Counsel had met his initial *Wright Line* burden and then focused on the Respondent's defense burden. But under *Wright Line*, we need not address the Respondent's defense if the General Counsel has failed to satisfy his initial burden. See, e.g., *Volvo Group North America, LLC*, 370 NLRB No. 52, slip op. at 2–4 (2020) (reversing unlawful discipline finding for lack of evidence that the employer harbored animus against the employee's protected activity). It is undisputed that Schramm engaged in protected concerted activity and that the Respondent knew as much. However, the Board's conclusion that the Respondent harbored animus against Schramm for his

[5] The judge analyzed Schramm's suspension and discharge as a single event, and so did the court of appeals. We will follow suit and refer simply to Schramm's discharge. As noted, the Board also adopted the judge's finding that the Respondent violated Sec. 8(a)(1) by denying Schramm union representation during the due process meeting.

[6] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

protected activity was based entirely on its finding that Cordell responded to Schramm's complaints about second-hand marijuana smoke by threatening to discharge him, and the court has concluded that no such threat was uttered. And while a discriminatory motive may be inferred from a finding that the employer's stated reason for discharging an employee is pretextual,[7] the court also rejected the Board's finding that the Respondent's stated reason was a pretext. The court's conclusions are law of the case. We therefore have no occasion to determine whether, under the *Sutter East Bay* standard, the Respondent succeeded in proving that it would have suspended and discharged Schramm even absent his protected activity. The General Counsel having failed to sustain his initial burden of proof, we dismiss the remaining allegation that Schramm's suspension and discharge violated Section 8(a)(1).

ORDER

The complaint is dismissed.

Dated, Washington, D.C. April 15, 2021

Lauren McFerran, Chairman

William J. Emanuel, Member

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER RING, concurring.

I agree with my colleagues' analysis. The court's determinations that Cordell did not threaten Schramm and that the Respondent's stated reason for discharging him was not a pretext are law of the case, and they preclude us from finding that the General Counsel met his burden under *Wright Line*[1] of proving that protected concerted activity was a motivating factor in the Respondent's decision to suspend and discharge Schramm. I write separately, however, to make two further points.

First, while I agree that the Board is foreclosed from relying on pretext to infer a discriminatory motive for Schramm's discharge, I would not infer animus from pretext here in any event. As my colleagues observe, when an employer's stated reasons for discharging someone are found to be pretextual, discriminatory motive *may* be inferred. But such an inference is not compelled.[2] Whether a reasonable inference of unlawful motive may be drawn from pretext depends on whether the surrounding circumstances reinforce or undermine a conclusion that the employer acted because of an employee's union or protected concerted activity.[3] Here, even assuming a pretext finding was not precluded by the court, the circumstances do not reinforce such an inference. Schramm was not threatened, and there are no other reinforcing circumstances. In fact, the record actually points the other way. After Schramm and a coworker raised their concerns about exposure to second-hand marijuana smoke, the Respondent promptly implemented a policy addressing the issue in consultation with an agent of International Union of Operating Engineers Local 501. That fact weighs against concluding that the Respondent's stated reason for discharging Schramm—his refusal to undergo a required medical exam—hid hostility to Schramm for raising the issue.[4]

Second, I agree with my colleagues that because the General Counsel cannot sustain his burden of proof under *Wright Line*, the analysis may end there without reaching the Respondent's defense. Nevertheless, the court raises an important point regarding the Board's application of *Wright Line*'s second step, and the court's decision affects not only this case but the Board's future application of *Wright Line*, or at least it should. Therefore, I believe it necessary to address this issue. Citing *Sutter East Bay Hospitals v. NLRB*, 687 F.3d 424 (D.C. Cir. 2012), the court held that "*Wright Line*'s second prong requires the Board to examine first, whether the employer 'reasonably

[7] See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) ("If [a trier of fact] finds that the stated motive for a discharge is false, he can certainly infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference.").

[1] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

[2] *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 3 (2019).

[3] See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) ("If [a trier of fact] finds that the stated motive for a discharge is false, he can certainly infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference."); *Electrolux*, supra.

[4] The General Counsel argues that the timing of the discharge was suspicious because it occurred shortly after Schramm voiced his protected complaints. I disagree. Schramm's refusal to submit to the exam immediately preceded, and thus accounts for the timing of, his suspension and discharge. The General Counsel also notes that the Respondent had not previously required Schramm to wear a respiratory mask while working, but nothing in the record suggests that the Respondent imposed the medical exam on Schramm, a new employee, because it thought he might refuse and thus provide grounds for termination.

believed' the employee committed the acts supporting discipline, and second, whether the decision was consistent with the company's 'policies and practice.'" *Circus Circus Casinos*, *Inc*., 961 F.3d 469, 481 (D.C. Cir. 2020) (quoting *Sutter East Bay*, 687 F.3d at 435). Moreover, the court held that this two-pronged examination is required even in cases where pretext is found. "Determining an employer's explanation to be pretext is a legal conclusion that follows from the *Wright Line* analysis," the court explained, "not an upfront finding that short circuits consideration of the whole record." Id. at 482. I agree with the court.

The court is certainly correct that an employer's reasonable belief that an employee engaged in misconduct and the consistency of the challenged discipline with past practice are always relevant considerations in determining whether an employer has met its *Wright Line* defense burden. The Board occasionally states that there is no need to analyze an employer's *Wright Line* defense once it has found the employer's stated reason or reasons to be pretextual.[5] What this means is simply that once the stated reason for an adverse employment action is found to be pretextual—that is, false or not in fact relied upon—there is no point asking whether the employer would have taken that action for that reason even in the absence of the employee's protected activity. In other words, a successful *Wright Line* defense cannot possibly be based on a stated reason that wasn't relied on or was simply made up. But the Board must take care to ensure that it is not using pretext to "short-circuit" a proper evaluation of an employer's *Wright Line* defense, as it did in this case by basing a finding of pretext on speculation about what the Respondent would have done if its stated reason for discharging Schramm had been sincere. In order to determine that an employer's stated reason is not the actual reason and thus pretextual, the Board must first consider the entire record, including not only the employer's stated reason, but also its reasonable beliefs about employee misconduct, its written policies, and its past practice of treating such misconduct. Only after such consideration can the Board reasonably conclude that an employer's proffered justification for a challenged adverse employment action was false or not in fact relied upon.[6] Accordingly, the Board's pretext doctrine, properly understood and applied, is wholly consistent with the principles stated in *Sutter East Bay*.

Dated, Washington, D.C. April 15, 2021

John F. Ring, Member

NATIONAL LABOR RELATIONS BOARD

[5] See, e.g., *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Parkview Lounge, LLC d/b/a Ascent Lounge*, 366 NLRB No. 71, slip op. at 3 (2018), enfd. 790 Fed. Appx. 256 (2d Cir. 2019). In *Wright Line* itself, the Board explained that "the distinction between a pretext case and a dual motive case is sometimes difficult to discern," 251 NLRB at 1084 fn. 5, and that a benefit of its new burden-shift framework is "that the perceived significance in distinguishing between pretext and dual motive cases *will be obviated*," id. at 1089 fn. 13 (emphasis added). The Board in *Wright Line* clearly contemplated that its burden-shifting framework would apply in both scenarios, not that pretext cases are analyzed differently.

[6] *Electrolux Home Products*, supra; see also *Wye Electric Co.*, 348 NLRB 61, 62 (2006) ("The judge's finding of a reasonable belief on the part of the [employer] as to Britt's alleged drinking shows that the stated reason for its actions was not pretextual."); *Hoffman Fuel Co.*, 309 NLRB 327, 328–329 (1992) (reversing judge's pretext finding because employer reasonably believed that employee had engaged in misconduct that violated its policies).